BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
SYLVIA GABLE (Sylvia Stanley of Alderly))

Appearances:

For Appellant: Barry Brannen, Attorney at Law

For Respondent: John S. Warren, Associate Tax Counsel

O P I N I O N

This appeal by Sylvia Gable (then Lady Sylvia Stanley of Alderly) is from the action of the Franchise Tax Board in denying her protest against a proposed assessment of additional personal income tax in the amount of $3,360.94 for the year 1948.

Appellant, during the period in question, was a British national, non-resident in the United States. She owned an undivided quarter interest in real property in Los Angeles which she sold in 1948 after a suit for partition had been commenced by one of the other tenants in common. The price received by Appellant was 95,000 pounds sterling paid to her in England by the buyer out of film revenues which, in the buyer's hands, were subject to detailed restrictions as to their use under the terms of the Memorandum of Agreement between His Majesty's Government and the Motion Picture Industry. Use of the funds in this transaction had to be and was authorized by the Exchange Control Committee, set up by the above-mantioned agreement. Once the sterling was transferred to Appellant, however, it was free of the restrictions imposed by that agreement but became subject to the restrictions imposed by the English Exchange Control Act of 1947 (10 & 11 Geo. 6, Ch. 14). Under that Act, Appellant, as a resident of the United Kingdom, could not, without permission, transfer any of her sterling for dollars either inside or outside of the United Kingdom. The penalty for doing so without permission could be a fine, imprisonment and/or forfeiture. Appellant could spend or invest the funds in the United Kingdom, and did in fact invest at least part of the sum in securities.

Appellant reported no gain upon the sale of the Los Angeles property in 1948 contending that she did not become liable for any tax in 1948 because she received nothing which

had a market value in terms of dollars which are the measure of the tax. The Franchise Tax Board bases its proposed assessment upon the theory that Appellant realized gain upon receipt of the sterling inasmuch as sterling is the currency of her country of residence and is freely expendable by her anywhere in the sterling area. Thus the first issue is whether or not Appellant realized gain upon receipt of the sterling in 1948,

Appellant cites three cases in which it was held that no income was realized upon receipt of blocked foreign currency: International Mortgage & Investment Corp., 25 BTA 187; United Artists Corporation of Japan, T. C. Memo. Dkt. No. 272, June 13, 1944, and Corn Products Refining Company T. C. Memo. Dkt. No, 22074, June 30, 1952, aff'd. on burden of proof in 215 Fed. 2d 513. However, as is said in Mertens, Law of Federal Income Taxation (1955 Ed,), Volume 2, Section 10.17, "The more recent cases have, in some instances, followed the International Mortgage decision, but more often have distinguished that case and held the taxpayer liable for tax on the blocked income."

An examination of these more recent cases holding that the taxpayer has received income upon receipt of the blocked foreign currency discloses that the basis for the holdings is the fact that the recipient received economic satisfaction because he was able to use the currency in the other country for personal expenses and/or investment. Thus in Ceska Cooper, 15 T. C. 757, a case involving a British citizen whose London account was credited with certain salaries and dividends, the court said, at page 764: "It is true that under British Law and British Treasury regulations these credits could not have been brought to the United States in cash, But, as we have already said, they were freely expendable by petitioner anywhere in the sterling area and we think that makes them taxable income to petitioner, See Ederet v. Commissioner, 138 Fed. (2d) 27; Max Freudmann 10 T. C. 775." Similarly in Edmond Weil, Inc. v. Commissioner of Internal Revenue, 150 Fed. 2d 950, where the court considered a contention similar to the one made here by Appellant, it said, at page 951, "The taxpayer objects to the decision of the Tax Court principally on the ground that there was no taxable capital gain since it 'could not export the gain to the United States'.., . Even if this were so, the taxpayer could not succeed and we ought to do no more than remand so that evidence might be presented to show some other basis for measuring an evident gain than current rates of exchange - just as we did in Eder v. Commissioner of Internal Revenue, 2 Cir., 138 F. 2d 27."

Appellant seeks to distinguish the cases relied on by the Franchise Tax Board on the ground that they involved

special legislation and therefore do not represent any departure from the principles enunciated in the International Mortgage case, supra. While the Eder and Freudmann cases didinvolve special legislation, -decisions did not rest solely upon that ground. Thus in Eder the court said, at page 28, "The evidence does not make it clear whether or not owners of 'blocked' pesos could have sold them for dollars to citizens of this country wishing to invest or spend the pesos in Colombia. But even if we assume that such a transaction was not lawfully possible under the laws of Colombia, or that there would have been an obligation to return to Colombia the dollars thus received, still there can be no denying that the taxpayers could have invested, or spent the 'blocked' pesos in Colombia and, as a result, could there have received economic satisfaction.., ." Furthermore, in the Cooper and Weil cases, supra, there was no special legislation and yet the taxpayer was held to have realized income.

Appellant also argues that to impose a tax here would be to tax gain out of which no dollars can be realized with which to pay the tax. This argument was also made in the Eder case, supra, and was therein answered in this way (p. 28): "We do not agree with taxpayers' argument that inability to expend income in the United States, or to use any portion of it in payment of income taxes, necessarily precludes taxability. In a variety of circumstances it has been held that the fact that the distribution of income is prevented by operation of law, or by agreement among private parties, is no bar to its taxability, See, e.g., Heiner v. Mellon, 304 U.S. 271, 281, 58 S. Ct. 926, 82 L. Ed, 1337; Helvering v. Enright's Estate, 312 U.S. 636, 641, 61 S. Ct. 777, 85 L. Ed. 1093; cf. Helvering . Bruun, 309 U.S. 461, 60 S. Ct.631, 84 L. Ed. 864." We conclude then that a taxable gain was realized by Appellant upon receipt of the blocked pounds.

This brings us to the second issue: Is the reporting of the gain deferable to a later year under Mimeograph 6475, 1950-l CB 50. Appellant asserts that it is. The Franchise Tax Board argues that the Mimeograph does not cover this situation,

Mim. 6475, supra, provides that a taxpayer realizing income in a foreign currency which is not readily convertible into dollars or into other money or property readily convertible into dollars may elect to use a method of accounting under which such income is not taxed until:

(a) It becomes readily convertible.

(b) It is actually converted.

(c) It is used for personal expenses or is otherwise disposed of, e.g., by gift, or

(d) "In the case of a resident alien, a taxpayer terminates his residence in the United States."

Although the Mimeograph speaks of taxpayers generally, the Franchise Tax Board argues that it does not cover the situation with which we are concerned, namely where a non-resident alien receives blocked foreign currency, We agree with this contention. (See Roberts, New Developments in Foreign Exchange, in Proceedings of N. Y. U. 9th Ann. Inst. on Fed. Taxation (1951) 819, 820, footnote 7.) Under Mim. 6475 a resident alien must report the income when he leaves the country. And as stated by Mr. Roberts? "The realization of income by change of status from resident to nonresident represents a novel approach with no counterpart in allied situations. Its necessity in this area seems impressive." Inasmuch as Appellant was a nonresident of California at the time of the transaction in question, the reasoning behind Mim. 6475 is without application.

Having concluded that gain was realized by Appellant and that she must report that gain, the question of the dollar amount of the gain remains. The Franchise Tax Board has valued the sterling Appellant received at the free or open market rate of exchange on the date of receipt. Appellant argues that this method of valuation should not be used because her sterling could not be sold on the open market. Nevertheless, we feel that the value assigned it by the Franchise Tax Board was proper. It seems to us that if an American in New York would pay $2.85 for £ 1 which he could spend in the United Kingdom then Appellant, who could spend her sterling in the United Kingdom, received something which can be assigned the same dollar value.

Appellant's final contention is that the Franchise Tax Board should be estopped from including the gain in her income for 1948 because its area supervisor informed her that she had the option of reporting the gain in a later year, The Government is not estopped from the collection of taxes in the absence of a showing that justice and equity require it. Goodwill Industries v. County of Los Angeles, 117 Cal. App. 2d 19. No such showing has been made here. While Appellant may have relied upon the advice given her, she has not shown that she changed her position because of the advice or that she has suffered a detriment thereby,

Appeal of Sylvia Gable

O R D E R

Pursuant to the views expressed in the Opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREEY ORDERED, ADJUDGED AND DECREED, pursuant to Section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Sylvia Gable (Sylvia Stanley of Alderly) to a proposed assessment of additional personal income tax in the amount of $3,360.94 for the year 1948 be and the same is hereby sustained,

Done at Sacramento, California, this 16th day of December, 1958, by the State Board of Equalization.

George R. Reilly, Chairman

Paul R, Leake, Member

J. H. Quinn, Member

Robert E. McDavid, Member

Robert C. Kirkwood, Member

ATTEST: Dixwell L. Pierce, Secretary